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**SUPREME COURT OF THE
UNITED STATES**

No. 280

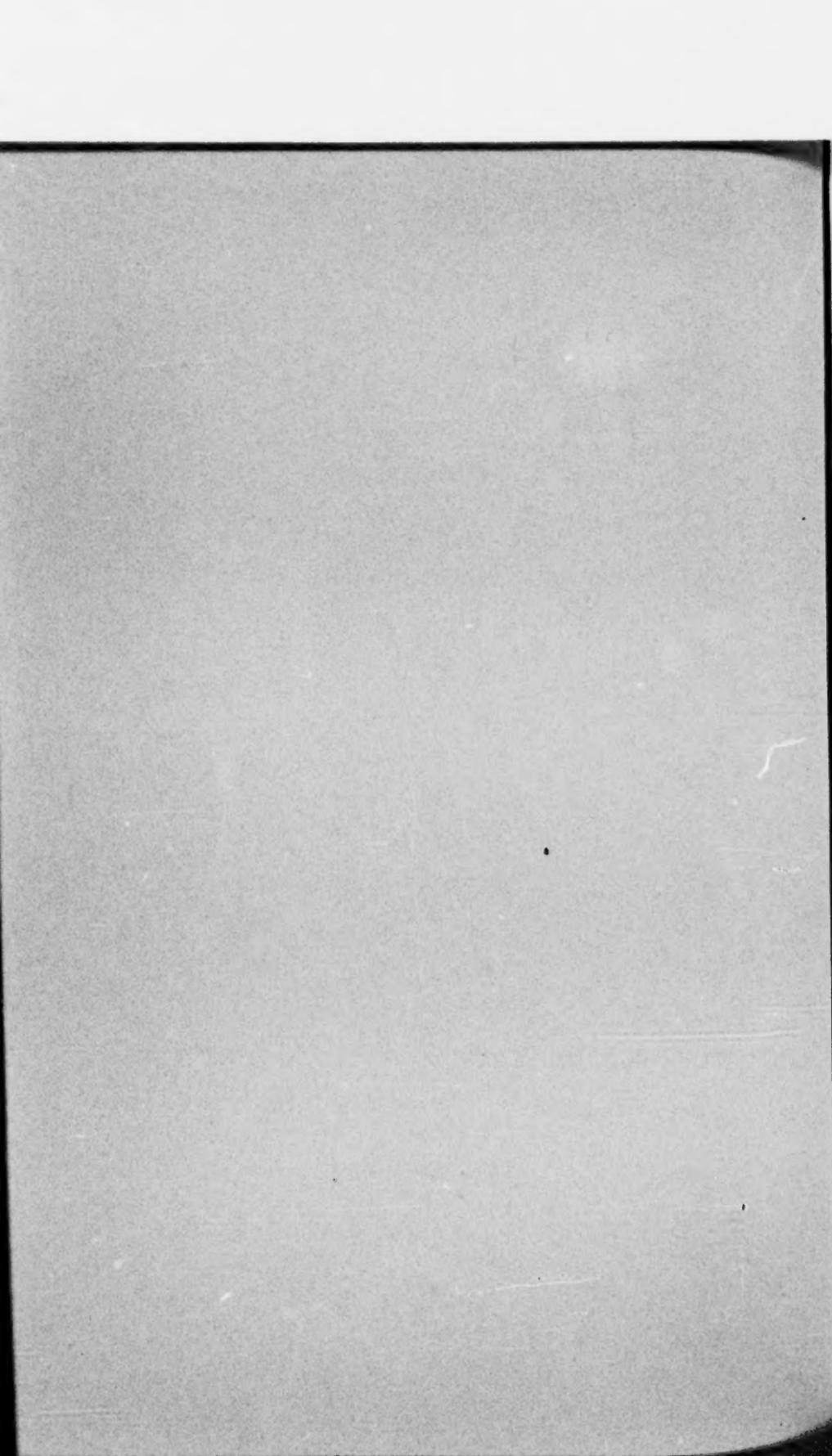
HARRY KORTZ, PETITIONER,

vs.

**THE GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA, a corporation, RESPONDENT.**

**PETITION FOR A WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF.**

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No.

HARRY KORTZ, PETITIONER,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY
OF AMERICA, a corporation, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Harry Kortz, the petitioner herein, respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit, and as grounds therefor and in support thereof respectfully shows:

A. SUMMARY—STATEMENT OF MATTERS INVOLVED.

(The petitioner herein will be referred to as Kortz and the respondent as Guardian, and the figures in parentheses shall refer to the pages of the printed Transcript of Record.)

Kortz was the insured under a life insurance policy issued by Guardian, dated August 20th, 1923, which provided in addition to the usual life insurance provisions for total and permanent disability benefits, for which benefits an additional premium was charged by Guardian and paid by Kortz (289). The total and permanent disability provision is as follows:

"And during total and permanent disability of the insured the company agrees to pay to the insured a monthly income of \$220.00 and to waive payment

of premiums hereunder subject to the provisions contained in paragraph 22 hereof."

Paragraph 22 of said policy is as follows:

"22. Benefits in Case of Total and Permanent Disability.—If due proof shall be furnished to the company at its Home Office that the Insured, before attaining the age of sixty years and while there was no default in payment of premium hereunder and this policy was in full force and effect, has either (a) become totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work or from following any occupation whatsoever for remuneration or profit, or (b) suffered the total and irrecoverable loss of the sight of both eyes, or the loss by severance of both entire hands or of both entire feet or of one entire hand and one entire foot, hereinafter referred to as "Specified Disabilities", then upon approval of such proof, the Company will grant the monthly income and waiver of premium benefits specified below, the disability under (a) above being presumed to be permanent if it is present and has been in existence continuously for not less than three consecutive months and the disabilities under (b) above being considered in themselves total and permanent disabilities hereunder without prejudice to other causes of disability.

7 Disability Income. The Company will begin to pay to the Insured the disability income stated on the first page hereof to be reckoned from the date of the receipt by the Company of satisfactory proof of total and permanent disability of the Insured or of the Insured's continuous total disability for three consecutive months. Such payments will be made on said date in each calendar month during the lifetime of the Insured and the continuance of such disability, and the amount of the payment to be made on approval of such proof shall include any monthly pay-

ment or payments that may have become due prior to such approval.

Waiver of Premiums. The Company will waive payment of further premiums becoming due hereunder during such disability, save any unpaid premium or premiums necessary to complete premium payments, for the first policy year. Any premium or premiums for the then current policy year other than the first policy year which shall have become due after the beginning of such disability and prior to approval of the proof hereof, will if paid, be refunded.

The face amount of the policy shall not be decreased because of any premiums waived or any income payments made, nor shall such waived premiums or income payments be deducted in any subsequent settlement of the policy, and the loan and surrender values will increase each year in the same manner and the amounts of the dividends will be the same as if each premium had been paid when due instead of being waived.

8 The Company will admit the age of the Insured when furnished with satisfactory evidence of the date of birth and reserves the right to require such proof of date of birth at the time proof of disability is furnished.

The Company shall not be liable to waive any premiums or pay any income under this provision of the disability shall result from military or naval service in time of war, or from performing such service within one year from the date hereof in time of insurrection or riot, or from performing within said year police duty of any kind, or from engaging or participating within said year as a passenger or otherwise in aerial navigation or service connected therewith.

Recovery from Disability. Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Company may at any time demand due proof of the continu-

ance of such total disability, but not oftener than once a year after such disability has continued for two full years; and upon failure to furnish such proof or if it shall appear to the Company, except in the case of the Specified Disabilities mentioned above, that the Insured is able to perform any work or follow any occupation whatever for remuneration or profit, no further premiums shall be waived and no further income payments shall be made.

Premium, Discontinuance. The Disability Benefits herein set forth are granted in consideration of the special premium stated on the first page hereof. This special premium is payable only before the Insured has attained the age of sixty years. Any premiums becoming due under this policy after said age will be correspondingly reduced.

9 At the end of any policy year before the Insured has attained age sixty the provisions of this policy for Disability Benefits will be discontinued upon the written request of the Insured or the owner accompanied by this policy for proper endorsements, and thereafter the payment of the respective special premium shall not be required." (11, 12, 13)

Kortz paid all premiums upon this policy of insurance and all charges for the total and permanent disability provisions, and on June 28th, 1938, having previously filed proof of his total and permanent disability and made demand for the payment thereof, which demand was refused, brought suit in the District Court of the City and County of Denver, State of Colorado, to recover total and permanent disability benefits from September 10th, 1937 (10), on the ground and for the reason that he had been disabled by bodily diseases, particularly arthritis of the spine (14), osteo-arthritis of the lumbar spine, general debility and a heart ailment (15). This case was tried to a jury, which returned a verdict in favor of Kortz on March 30th, 1939 (284), covering the period from April 21st, 1938, to March 21st, 1939. The company by writ of error appealed the judgment of said District Court to the Supreme Court of the State of Colorado, and on May 11th, 1942, the Supreme Court affirmed said judgment (286). Thereafter, Guardian paid the judgment.

Guardian having refused to pay any benefits subsequent to those covered by the judgment, Kortz instituted a second suit against Guardian on June 15th, 1942 (20) in the District Court in the City and County of Denver, State of Colorado, which was removed to the United States District Court for the District of Colorado on the petition of Guardian (21). In this action, the complaint filed by Kortz in the State Court alleged the previous adjudication of plaintiff's total and permanent disability, and set forth in detail all proceedings in the previous cause, including the pleadings therein (7). Upon motion by Guardian and over the objection of Kortz, the Judge of the United States District Court struck from these pleadings all reference to the previous case in the District Court of the City and County of Denver and to its affirmance by the Supreme Court of the State of Colorado. An amended complaint was filed by Kortz in which he again referred to the trial, judgment and affirmance in the prior case (23), which reference was again stricken by the Judge of the United States District Court (27). A second amended complaint was then filed by Kortz in which in less specific terms reference was made to the prior trial and adjudication, whereupon upon motion of Guardian the Court again struck reference to the prior adjudication (31). Kortz then filed his written objection to the rulings of the Court (40).

The case was then tried to a jury in the United States District Court, which returned a verdict in favor of Guardian (41).

B. QUESTIONS PRESENTED.

The questions presented are:

1. Kortz having recovered a judgment which was affirmed by the Supreme Court of the State of Colorado to the effect that he was totally and permanently disabled for the period covered by said suit, did that judgment raise a presumption in law that said total and permanent disability continued?
2. If a presumption in law of the continuance of said total and permanent disability was created by the prior adjudication in the State Court, did that place the burden of proof upon Guardian to show a change of condition of

Kortz amounting to a recovery within the terms of the policy?

3. Should the trial court have determined as a matter of law that there was no change of condition upon the evidence presented?

4. Could the trial court disregard the express wording of the contract between Kortz and Guardian and make a new contract for them?

C. REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals for the Tenth Circuit has rendered its decision in this case, which decision is in direct conflict with the decisions of other Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals is not published as yet, but will be found at pages 309 through 315 of the Transcript of Record. It will be noted that this opinion reviews the history of the case and the question of prior adjudication and its effect raised by Kortz (309-310). The decision then purports to follow the case of *United States Fidelity and Guaranty Company v. McCarthy*, 33 F. 2nd 7, 70 A. L. R. 1447, a case decided by the Eighth Circuit.

The Circuit Court of Appeals by its decision approves the instructions given by the trial court by the following statement in its opinion:

“The court gave conventional instructions that the burden rested on plaintiff to establish his cause of action by a preponderance of the evidence. The burden did rest on him to establish by a preponderance of the evidence the fact that he was totally and permanently disabled during the period in question. That was the primary issue joined and the insured carried the burden of proving it. *U. S. Fidelity and Guaranty Company v. McCarthy*, 50 F. 2nd 2, certiorari denied, 284 U. S. 652. Therefore, it cannot be said that the general instruction was erroneous. But the instructions did not stop there. The jury was further in-

structed in substance that the adjudication of disability in the state court created a presumption that the condition continued in the future; that the presumption was strongest at the beginning and diminished in force with the lapse of time; and that the question for the jury to decide was whether the evidence in the case was sufficient to rebut or overcome the presumption. That instruction was substantially correct." (312-313)

The Circuit Court of Appeals for the Sixth Circuit in the case of *Kontorich v. U. S.*, 99 F. 2nd 661, at page 665 holds:

* * * * * "In a trial it will give full weight to the presumption of total permanent disability as previously judicially determined, and place upon the administrator the burden of proof to show subsequent change in the physical condition of the assured."

In *Countee v. United States of America*, 127 F. 2nd 761, 142 A. L. R. 1165, at 1169, the Circuit Court for the Seventh Circuit holds:

"In the instant case, the court below, relying upon our former decision, held the burden of proof was upon the Government to establish the affirmative of its contention that plaintiff had recovered the ability to continuously follow a gainful occupation. We reaffirm our holding in this respect. In the original action the burden was upon the plaintiff to sustain, by a preponderance of the evidence, the affirmative of the issue initiated by him. In the instant case, we see no reason why the Government should not be required, in a like manner, to sustain the affirmative of the issue originated by it. The finding in the original case of plaintiff's total and permanent disability carried with it the legal implication that such condition was reasonably certain to continue throughout life. Thus, a presumption was created in his favor which the Government was required to overcome. This necessitated that it carry the burden of proof with the right to open and close the case."

In the case of *Anderson v. U. S.*, 126 F. 2nd 169, the Circuit Court of Appeals for the Third Circuit says:

“From these rulings the Government would draw the conclusion that the prior judgment can be given no future effect at all. This conclusion, however, is too broad. While a verdict permitting recovery under the War Risk Insurance Act cannot settle the question of future disability, it must contain a finding that the presently existing disability has a reasonable certainty of continuing. This finding cannot be ignored in future controversies. From it is born a presumption based upon the reasonable certainty of the continuance of the condition.”

2. The Circuit Court of Appeals for the Tenth Circuit in this case and the District Court for the District of Colorado have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The opinion of the Circuit Court wholly fails to point out any evidence presented in the District Court to show that Kortz had recovered; that the disability which had existed and had been judicially determined to exist in the trial in the state court had ceased; that there had been a recovery or any improvement in the condition of Kortz. The record discloses that there was no such evidence; that the same witnesses who had testified in behalf of Guardian in the first trial testified in behalf of Guardian in the second trial, to the same effect. Kortz at the close of his testimony moved for a directed verdict, relying upon the rule of law that a disability judicially determined to be permanent is presumed to continue until the contrary is shown by a preponderance of the evidence. This motion was overruled by the trial court (40) and ignored by the Circuit Court of Appeals in its opinion. Kortz then moved for judgment notwithstanding the verdict or for a new trial (42), which motion was denied by the trial court (48) and completely ignored by the Circuit Court of Appeals.

The trial court by its refusal to direct a verdict in favor of Kortz for the period following the adjudication of perm-

ment and total disability by the state court in the first trial up to and including the time that Guardian demanded due proof of the continuance of the claimed total and permanent disability, which demand was made after the second suit was started, disregarded the express wording of the contract of insurance wherein it is provided:

“Recovery from Disability. Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Company may at any time demand due proof of the continuance of such total disability, but not oftener than once a year after such disability has continued for two full years; and upon failure to furnish such proof or if it shall appear to the Company, except in the case of the Specified Disabilities mentioned above, and the Insured is able to perform any work or follow any occupation whatever for remuneration or profit, no further premiums shall be waived and no further income payments shall be made.”

And made a new contract between the parties which gave the Guardian the right to question the continuance of the total disability within a period prohibited by the express terms of the agreement. The action of the trial court is approved by the opinion in the Circuit Court of Appeals (311).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Tenth Circuit, commanding said Court to certify and to send to this court for its review and determination a full and complete transcript of record and all proceedings in the case numbered and titled on its docket No. 2858, *Harry Kortz, Appellant, v. The Guardian Life Insurance Company of America, Appellee*, and for such other action as to this Court shall seem proper.

HARRY KORTZ, *Petitioner.*
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